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Nos. 81-2245 and 81-2276

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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STATE OF NEVADA, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether a 1944 final decree, confirming in the United States certain water rights for the separate purposes of benefitting both the Pyramid Lake Indian Reservation and the Newlands Reclamation Project, permits additional water-right claims for the Reservation to be litigated in a later case against, and satisfied at the expense of, only those water rights previously decreed for the Project, when in the prior case the separate interests of the Project and the Reservation, both represented solely by the same attorneys for the United States, were not disclosed as mutually adverse to one another.

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### OPINIONS BELOW

The opinion of the court of appeals (81-2245 Pet. App. 197a-253a),[1] as amended by its order of July 10, 1981 (Pet. App. 254a-255a) is reported at 649 F.2d 1286. A further order (Pet. App. 256a-259a) amending the opinion of the court of appeals, issued on January 5, 1982, is

[1] Hereinafter, all references to "Pet. App.", unless otherwise noted, are to the Appendix to the Petition for a Writ of Certiorari filed by the State of Nevada in No. 81-2245.

reported at 666 F.2d 351. The opinion (Pet. App. 161a-179a) and findings of fact and conclusions of law (Pet. App. 180a-192a) issued by the district court on December 8, 1977, are unreported. A prior opinion of the district court, rendered on February 5, 1975, is reported at 71 F.R.D. 10.

## JURISDICTION

The judgment of the court of appeals was entered on June 15, 1981. The petition for rehearing was denied on March 11, 1982 (Pet. App. 260a-261a). Separate petitions for a writ of certiorari were filed by the State of Nevada (No. 81-2245) and by the Truckee-Carson Irrigation District (No. 81-2276) on June 7 and 9, 1982, respectively.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. This suit was filed by the United States to quiet its title to a reserved water right, having priority as of the year 1859, for the maintenance and preservation of historic fisheries along the lower Truckee River and in Pyramid Lake in northwestern Nevada. The river's lower reaches, the lake, and the 475,000 acres adjoining them all comprise the Pyramid Lake Indian Reservation, which was established in 1859 and later confirmed in 1874 by Executive Order of the President (Pet. App. 182a, 199a). Today the Reservation is occupied by respondent Pyramid Lake Paiute Tribe of Indians, organized under a tribal constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476 (Pet. App. 183a). The reserved water right is sought for the Tribe's benefit.

b. Pyramid Lake is the downstream terminus of the Truckee River, a navigable interstate stream. As de-

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[2] On July 9, 1982, the Pyramid Lake Paiute Tribe of Indians, a respondent to the petitions in Nos. 81-2245 and 81-2276, filed a conditional cross-petition for a writ of certiorari (No. 82-38).

scribed by this Court, "[t]he Truckee rises in the High Sierra, flows into Lake Tahoe, through which the California-Nevada boundary runs, exits on the California side of the Lake, and flows 20 miles before crossing into Nevada. It then continues another 65 miles, through Reno and beyond, to its termination in Pyramid Lake, a desert lake 20 miles long and five miles wide, with no outlet and a water level determined by the balance or imbalance between inflow and evaporation" (*United States* v. *State of Nevada*, 412 U.S. 534, 535-536 (1973)).[3] The water level of Pyramid Lake dropped some 40 feet between 1920 and 1938, reducing the surface area by about 20,000 acres, and by 1921 a delta had formed impeding the Truckee's flow into the lake, all to the detriment of the fishery that once flourished there (Pet. App. 204a-205a, 208a-209a). Providing the Tribe with access to this fishery was one purpose for establishing the Pyramid Lake Reservation originally, as the district court found below (*Id.* at 183a, 199a). Yet, since 1940, as the level of the lake continued to drop even further, one species of fish indigenous to the fishery has become extinct, another has been officially classified as "endangered," and still another as "threatened" under the Endangered Species Act of 1973, 16 U.S.C. (& Supp. IV) 1531 *et seq.* (Pet. App. 208a-209a).[4]

c. The fishery's decline stems from upstream diversions of Truckee waters, which have depleted the flow into Pyramid Lake. The largest such diversion, at Derby Dam, sends a substantial volume of Truckee waters (Pet. App. 205a) through the Truckee Canal, out of

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[3] Maps depicting the area in question are reproduced in *United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763, 765 (9th Cir. 1970), and as an appendix to the United States' Motion for Leave to File Complaint in *United States* v. *Nevada*, No. 59 Original, 1972 Term.

[4] The Secretary of the Interior has listed the cui-ui (*Chasmistes cujus*) as "endangered" and the Lahontan cutthroat trout (*Salmo clarki henshawi*) as "threatened." 50 C.F.R. 17.11, at 74-75.

the Truckee watershed to Lahontan Reservoir on the Carson River. From there, the water is distributed for irrigation and related uses on private lands within the Newlands Reclamation Project.[5] Derby Dam, Truckee Canal, and Lahontan Reservoir were all constructed by the United States as part of the Newlands Reclamation Project (*id.* at 184a), one of the first undertaken after passage of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 *et seq.*, 43 U.S.C. 371 *et seq.* Since 1926, the Project has been operated and managed by petitioner Truckee-Carson Irrigation District ("TCID"), subject to the terms of a contract with the United States (Pet. App. 186a).[6]

2. Diversions at Derby Dam for the Newlands Reclamation Project were based on claims made by the United States, pursuant to Nevada state law and as authorized by Section 8 of the Reclamation Act of 1902, 43 U.S.C. 372, for appropriative rights to Truckee waters with a 1902 priority date (Pet. App. 200a). However, in order

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[5] Certain distributions for part of the lands on the Newlands Project's Truckee Division are made by direct diversion from the Truckee Canal before it empties into Lahontan Reservoir.

[6] In 1974, the Secretary of the Interior notified TCID that he would terminate the 1926 contract permitting operation of the project by TCID. Before the contract's termination could take effect, TCID sued the Secretary in the United States District Court for the District of Nevada to prevent the termination. This suit was tried in October 1979, but has not yet been decided. *Truckee-Carson Irrigation District* v. *Secretary of the Interior*, Civil No. R-74-34 BRT (D. Nev.).

The Secretary's 1974 termination notice was issued because TCID resisted the Secretary's enforcement of new operating criteria for the Project (38 Fed. Reg. 6697 (1973)) mandated by an order of the United States District Court for the District of Columbia in *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252, 262-266 (1973), a case to which TCID was not party. The disputed operating criteria supplemented earlier general operating criteria adopted by the Secretary in 1967 to govern the exercise by the United States of its water rights on the Truckee and Carson Rivers in such a manner as to make as much Truckee River water available to Pyramid Lake as possible. See 43 C.F.R. 418.3(a).

to resolve these claims and claims on behalf of Indians on the Pyramid Lake Reservation for water to irrigate lands thereon, as against competing water-right claims by non-federal parties along the Truckee and its tributaries, the United States in 1913 commenced a quiet title suit, *United States* v. *Orr Water Ditch Co.*, Equity No. A-3, in the United States District Court for the District of Nevada (Pet. App. 1a-11a; 184a-185a). All Truckee water users in Nevada were joined as defendants (*id.* at 201a).

After trial and receipt of the special master's report, the district court issued a temporary restraining order in 1926 (Pet. App. 12a-16a) to govern the parties' use of Truckee waters until entry of a final decree (*id.* at 185a-186a, 204a). The final decree in *Orr Ditch* was entered on September 8, 1944 (Pet. App. 17a-150a). Neither the petitioners herein, Nevada and TCID, nor the respondent Tribe was named as a party in the *Orr Ditch* case (Pet. App. 149a; 186a; 242a), although the court's final decree did adopt (*id.* at 143a-144a) the terms of the Truckee River Agreement of July 1, 1935 (81-2276 Pet. App. A110-A184) to which representatives of TCID, the United States, and others were signatory. No member or official of the Tribe signed this Agreement, but Article XI thereof (81-2276 Pet. App. A158-A160) stipulated to a reserved water right for irrigating the Pyramid Lake Reservation in the amounts ultimately awarded by the *Orr Ditch* decree. The decree itself confirmed water rights for both the Reservation and the Newlands Project only in the name of the United States (Pet. App. 56a-59a, 245a).

For irrigation on the Reservation, *Orr Ditch* generally decreed a reserved water right, with a priority date of December 8, 1859, to divert 4.71 acre feet of Truckee water per irrigated acre each calendar year for the irrigation of 3,130 acres of reservation bottom lands, and 5.59 acre feet per irrigated acre each calender year for the irrigation of 2,745 acres of reservation bench (or river terrace) lands (Pet. App. 57a-58a, 187a). No reserved rights for sustenance of the Pyramid Lake fishery or for

other purposes were claimed or decreed for the Reservation. The district court later found that there was "no evidence * * * that a *Winters*[7] implied and reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings" (*id.* at 189a).

For the Newlands Project, *Orr Ditch* decreed generally (Pet. App. 58a-59a) a right with a 1902 priority date to divert Truckee waters at Derby Dam at the rate of 1,500 cubic feet per second for irrigation of 232,800 project acres, for storage at Lahontan Reservoir, for power generation, and for other municipal and domestic purposes. This diversion is subject to "such control, disposition and regulation as the plaintiff [United States] may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the [project] bottom lands, nor 4.5 acre feet per acre for the [project] bench lands * * *" (*id.* at 59a).

3. After entry of the *Orr Ditch* decree, the continued decline of the Pyramid Lake fishery provoked concern by the public, the Tribe, and the federal and state governments (Pet. App. 190a-191a, 208a-210a, 246a, 256a-257a).[8] Ultimately, in September 1972, the United States

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[7] See *Winters* v. *United States*, 207 U.S. 564 (1908).

[8] Activities undertaken since 1950 concerning the fishery include:

(1) Congress, in Section 4 of the Washoe Project Act of 1956, Pub. L. No. 858, 70 Stat. 777, directed that facilities at Lake Tahoe provide for increased water releases and restoration of the fishery. The House Report stressed that the fishery's restoration "to its full potential value is deemed to be of national interest and importance." H.R. Rep. No. 2055, 84th Cong., 2d Sess. 4-5 (1956).

(2) On February 21, 1967, the Secretary of the Interior adopted general operating criteria to govern the exercise of federal water rights in the Truckee and Carson River systems. 32 Fed. Reg. 3098; 43 C.F.R. Part 418. One objective of these criteria was to maximize the use of Carson River waters to meet water requirements on the Newlands Project and to conserve Truckee flows so as to make as much water available to Pyramid Lake as possible. 43 C.F.R.

applied for leave of this Court to file a complaint seeking, *inter alia*, declaration and quantification of a reserved right to Truckee River waters for a fishery on the lower

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418.3(a). At the suit of the Tribe, the United States District Court for the District of Columbia in 1973 ordered the Secretary to strengthen these regulations in specific ways to maximize the availability of water for the Pyramid Lake fishery for the benefit of the Tribe. *Pyramid Lake Paiute Tribe* v. *Morton*, *supra*, 354 F. Supp. at 232-266; 38 Fed. Reg. 6697 (1973). This district court order remains outstanding, and the district court retains jurisdiction to enforce it. As explained above (see note 6, *supra*), the Secretary sought to cancel the contract with TCID when it resisted compliance with the new operating criteria, but TCID sued to prevent the cancellation.

(3) In 1968, the Tribe unsuccessfully sought to intervene in the ongoing general adjudication of rights to Carson River waters, which also flow into Lahontan Reservoir for distribution to lands on the Newlands Project. The Tribe claimed that the Secretary's 1967 operating criteria (43 C.F.R. Part 418) "unitized" the operation of the Truckee and Carson Rivers and that tribal intervention therefore was justified to minimize diversions from the Truckee for the Project. Intervention was denied. *See United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763 (9th Cir. 1970), cert. denied, 401 U.S. 909 (1971). Subsequently, water rights in the Carson River were adjudicated by final decree entered in *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), appeal pending, Nos. 81-4084 and 81-4116 (9th Cir. argued May 14, 1982).

(4) In December 1971, the Pyramid Lake Task Force issued its Final Report, recommending (at 38) resolution of the Tribe's claims to Truckee waters for the preservation of Pyramid Lake. The Final Report noted that the Task Force's Water Rights Study Group had suggested that the Tribe or the United States commence a lawsuit to ascertain the Tribe's water rights (*ibid.*). The Task Force itself, a joint federal-state undertaking, had been created as the result of a July 1969 meeting between Governors Reagan of California and Laxalt of Nevada and Secretary of the Interior Hickel (*id.* at v).

(5) In 1975, the Tribe and the United States settled a tribal claim brought in 1951, pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. (& Supp. IV) 70 *et seq.*, for damages to the Pyramid Lake fishery as the result of not receiving "all the water to which [the Tribe] * * * was entitled under rights reserved for it" when the Reservation was established. *Pyramid Lake Paiute Tribe* v. *United States*, 36 Ind. Cl. Comm. 256, 259 (1975). The parties

Truckee and in Pyramid Lake. *United States* v. *State of Nevada*, No. 59 Original. This Court denied leave to file the complaint, declining to exercise its original but nonexclusive jurisdiction under 28 U.S.C. 1251(b)(2) because concurrent jurisdiction over the controversy existed in the United States District Court for the District of Nevada. *United States* v. *Nevada*, 412 U.S. 534 (1973).

4. The instant case then was commenced by the United States in the United States District Court for the District of Nevada in December 1973. Joined as defendants were approximately 17,000 persons whose rights stemmed from the *Orr Ditch* decree, as well as petitioners Nevada [9] and

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stipulated that this $8 million settlement did not represent "damages or compensation for the loss, diminution or taking of any such reserved water rights" (*id.* at 259-260). The Tribe covenanted that, if it should "finally be judicially determined that, by reason of acts or omissions of the United States done or occurring prior to the date of execution hereof," such reserved water rights "were lost, taken, subordinated to other rights, or otherwise diminished," it would not again sue the United States for additional damages or compensation (*id.* at 261). This covenant not to sue, however, did not extend to post-settlement acts or omissions by the government (*ibid.*)

(6) The Secretary has sought to operate the Stampede Dam on a tributary of the Truckee River in a way that maximizes water use for preservation of the Pyramid Lake fishery, but that operation has been challenged by parties seeking to require the use of the water for municipal and industrial uses. See *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982). The district court has ruled on certain threshold matters, but has not yet determined the effects of the Tribe's water rights on operation of the Dam. *Id.* at 112.

(7) Efforts have been pursued to reach a comprehensive resolution of the various disputes and lawsuits, including the instant case, affecting the competing demands for water in the Truckee and Carson watersheds in a way that would free up more water for the Pyramid Lake fishery while still providing for an adequate supply of water for other uses. See, *e.g.*, 128 Cong. Rec. S4826 (daily ed. May 11, 1982).

[9] The United States named petitioner Nevada as a defendant in its proprietary capacity, in its governmental capacity as issuer of water-appropriation permits, and as parens patriae for its citizens (Pet. App. 211a). On April 29, 1975, the district court granted

TCID. The Tribe later intervened as a co-plaintiff. The government's complaint claimed a reserved water right, with a November 29, 1859 priority date, for maintenance of Pyramid Lake and the lower Truckee River for a fishery and other purposes beneficial to the Tribe and sought quantification of this right (Pet. App. 159a).[10] Petitioners and other defendants asserted that the fishery water-right claim was barred by res judicata and collateral estoppel by virtue of the final decree in *Orr Ditch*. In February 1975, the district court bifurcated the trial in order to try these affirmative defenses first (71 F.R.D. at 12-13).[11]

On December 8, 1977, the district court dismissed with prejudice the Tribe's complaint in intervention and dismissed with prejudice the government's action to the extent it sought a reserved right for the tribal fishery (Pet.

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Nevada's motion that the suit be dismissed against it in its capacity as parens patriae for its citizens. Accordingly, we question the recital in Nevada's petition that it is appearing in this Court "in its quasi-sovereign capacity" on behalf of all the people and entities of the State. Nevada's petition does not seek review on any other matters such as those pertaining to any state proprietary right or state governmental power.

[10] The complaint also asserted, *inter alia*, federally reserved water rights for the Stillwater National Wildlife Refuge, with a 1948 priority date, and for Toyaibe National Forest, with priority dates of 1905, 1909, and 1926 (Pet. App. 155a-156a, 159a-160a; 211a). These additional claims were not addressed by the district court in its later dismissal of the Tribe's complaint in intervention and of so much of the government's complaint as sought "a Winters reserved water right for the Pyramid Lake Tribe of Indians for fishery purposes" (Pet. App. 195a-196a). These additional claims likewise were not addressed by the district court's opinion (Pet. App. 161a) and findings and conclusions (Pet. App. 180a-192a).

[11] At the same time, the district court joined approximately 3,800 recipients of Newlands Project water who held water right certificates or other contracts with the United States or TCID entitling them to Project water. The court certified these 3,800 defendants as a class pursuant to Fed. R. Civ. P. 23 and designated TCID as the representative of the class. 71 F.R.D. at 13-18.

App. 195a-196a). The court held that, because no reserved water right for the fishery was "actually ever litigated" in *Orr Ditch* (Pet. App. 189a), the fishery claims of the United States and Tribe were not barred by the doctrine of collateral estoppel (*id.* at 192a). But the court concluded that the doctrine of res judicata did bar these claims (*ibid.*) because, in its view, the claim for a reserved water right for irrigation purposes asserted by the United States for the Tribe in *Orr Ditch* was the "same quiet title cause of action" now asserted (*id.* at 188a) and because the United States, and the Tribe in privity with it, each had a "full and fair" opportunity in *Orr Ditch* to present and litigate the fishery claim (Pet. App. 186a, 188a). The district court certified its dismissal of the Tribe's complaint as final under Fed. R. Civ. P. 54(b) and its partial dismissal of the United States' action under 28 U.S.C. 1292(b), staying further proceedings pending appeal (Pet. App. 195a-196a). The Tribe appealed and the United States was granted leave to take an interlocutory appeal.[12]

5. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. 649 F.2d at 1313. The court held that the preclusive effect of the *Orr*

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[12] The district court also held, as an additional ground for its dismissals, that the reserved water right for the Reservation's fishery had been "extinguished" or "taken" by the United States some time before 1934 when "the executive or administrative decision not to assert a fishery right [in *Orr Ditch*] had already been made" (Pet. App. 179a). The court held that federal authority to "extinguish" or "take" this reserved right was granted by Sections 7 and 10 of the Reclamation Act of 1902, 43 U.S.C. 421 and 373, and by Section 26 of the Appropriations Act of 1904, ch. 1402, 33 Stat. 225, providing for the irrigation of lands on the Pyramid Lake Reservation (Pet. App. 166a-167a, 189a-190a). The Ninth Circuit's reversal expressly held that the reserved fishery right, if it ever existed, was not "taken" or "extinguished" by the United States; that the 1902 Reclamation Act never authorized this to be done; and that, to the extent that the 1904 Appropriations Act may have done so, it was never implemented (Pet. App. 214a-222a). Neither petition seeks review of this aspect of the decision below.

*Ditch* decree barred the United States and the Tribe from seeking a water right for the Reservation's fishery which would impair or affect the decreed rights of any *Orr Ditch* defendant or his successor and the rights of any subsequent water appropriator who "reasonably relied on the decree" (Pet. App. 248a; see also *id.* at 224a-225a). In the court's view, the fishery claim could not be litigated against these parties because of the bar of "res judicata (or 'claim preclusion')" produced by the *Orr Ditch* decree, a bar which "applies not only to matters that were actually litigated but also to all claims that might have been litigated" in the earlier case (Pet. App. 226a n.11). Thus, the dismissal of the fishery claim was allowed to stand as against these defendants and junior appropriators (Pet. App. 239a-240a).[13]

However, the court held that the decree in *Orr Ditch* adjudicating the rights among the United States and other water users did not prevent the modification or adjustment of the water rights decreed in the name of the United States, as between the respective uses for the Pyramid Lake Reservation and the Newlands Project. The court of appeals explained that neither the United States, the Tribe, nor TCID filed any pleadings in *Orr Ditch* stating that the respective rights to be decreed to the United States for the Reservation and for the Newlands Project "would bind the Reservation and the Project *inter se*" (Pet. App. 243a). "As a general matter," the court reasoned, relying on Comment a to Section 82 of the *Restatement (Second) of the Law of Judgments* (Tent. Draft No. 2, 1975) and on Section 82 of the *Restatement (First) of the Law of Judgments* (1942), "a

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[13] The affirmance of the dismissal in this regard also was intended to maintain intact those water rights of TCID or its members derived "from any of the named defendants in *Orr Ditch*, or from subsequent appropriations not adjudicated in *Orr Ditch*" (Pet. App. 241a n.19). Only those rights of TCID and its members that are derived from rights decreed to the United States in *Orr Ditch* for use on the Newlands Project might be affected by the partial reopening of *Orr Ditch* permitted by the court of appeals.

judgment does not conclude parties who were not adversaries under the pleadings" except "only as to issues actually or necessarily litigated" (Pet. App. 240a-241a). Because there was no "adversity under the pleadings between these two interests" advanced by the United States and because, as the district court found, no fishery claim was actually litigated in *Orr Ditch*, the court of appeals was constrained to reverse the dismissal as to TCID (Pet. App. 245a). The court noted that it "might be persuaded to relax the adversity requirement" as between co-parties so as to "fit the realities of water adjudication" (*id.* at 241a). However, in *Orr Ditch*, the Tribe and TCID were not co-parties, but "nonparties who were represented simultaneously by the same government attorneys" (*id.* at 242a). In the court's view, this circumstance made the requirement that "adversity be established by pleadings * * * particularly compelling" (*id.* at 243a). Otherwise it would be necessary to assume that the United States "not only represented dual interests on the same side of a dispute, but that the government simultaneously, with the same lawyers, represented those dual interests in a dispute between themselves" (*id.* at 242a). But, the court continued, "[t]his posture is completely alien to our adversary system and will not be inferred from ambiguous facts. Before we conclude that government officials have undertaken such representation in litigation, we must be faced with a pleading in which this posture is clearly assumed" (Pet. App. 242a-243a).

The court therefore remanded for further proceedings, only as between the respective water rights previously decreed to the United States, on matters relating to the existence and extent of any reserved water right to maintain the Pyramid Lake fishery. In doing so, the court stressed the limited nature of its holding (Pet. App. 248a-249a):

> On remand the district court must determine whether the Tribe is entitled to a water right for its fishery. We express no opinion on that question. If

the Tribe is adjudged to have such a right, it is of course limited to a quantity of water "necessary to fulfill the purposes of the reservation, no more." *Cappaert* v. *United States*, *supra*, 426 U.S. [128] at 141, 96 S.Ct. [2062] at 2071 [(1976)]. And, of course, any additional rights due the Tribe must come from water rights decreed to the government in *Orr Ditch*. Neither the Tribe nor the government may expand its water rights beyond the limits of government rights decreed in the original proceeding.

## ARGUMENT

The decision of the court of appeals in the unique circumstances of this case is correct and does not conflict with any decision of this Court or of any other court of appeals. The ruling also is interlocutory in nature. There has not yet been a determination by the court of appeals that water was reserved to maintain the Pyramid Lake fishery when the Reservation was established for the benefit of the Tribe or, if such a reserved water right does exist, that a specified quantity of water would be required to satisfy it. These matters were left to the district court on remand. Thus, the practical impact, if any, of the decision is speculative at the present time. If the district court finds a reserved water right for fishery purposes, if the court of appeals affirms that holding, and if it appears at that time that the quantity of water determined to be necessary to satisfy that right will have a substantially adverse effect on the Newlands Project, there will be time enough for this Court to grant review, assuming the issue otherwise merits review.

There is, moreover, considerable doubt about the degree to which the Newlands Project would be affected even if a reserved water right ultimately is recognized for the Pyramid Lake fishery in the course of further proceedings. We do not disparage the importance of water to all users in northwest Nevada, Indian and non-Indian, nor the desirability of quieting the unsettled situation now prevailing. But the instant suit is but one aspect

of a multifaceted endeavor to conserve water in the Truckee and Carson watersheds and to secure additional water for Pyramid Lake. It is possible that those several measures will free up sufficient water to satisfy much, perhaps all, of whatever reserved water right would be recognized and in any event render the issue of whether the Tribe actually has the benefit of a *reserved* right for this purpose of little moment. By the same token, the pendency of a number of other cases and disputes regarding the operation of federal works on the Truckee and Carson river systems and diversions from those systems amply demonstrates that a decision by this Court on the res judicata issue presented by petitioners would not terminate the broader controversy regarding the conservation and allocation of water among competing uses in northwest Nevada. A comprehensive resolution of these matters eventually will be necessary.

It also must be stressed that the court of appeals did not fashion a significant exception to the doctrine of res judicata, either in civil litigation generally or in water adjudications in particular. To the contrary, the court upheld the application of res judicata to claims against *all* defendants in *Orr Ditch*, their successors in interest, and subsequent appropriators who relied on the decree. It thus did not permit a reopening of the *Orr Ditch* decree to enable the United States to acquire additional water at the expense of other parties to that case. The court simply permitted a reexamination of the allocation of water as between the several uses for which the United States itself claimed water in *Orr Ditch*. And the court did so by applying established res judicata principles in circumstances in which water decreed for the two federal purposes is used not by the United States itself, but by others who were not parties to the litigation that is sought to be given preclusive effect and whose interests therein were not adversely presented. Finally, it should be clear that the res judicata decision in this case will have virtually no precedential impact as a practical mat-

ter, because in no other case to our knowledge has the United States acted with regard to Indian interests as it did in the *Orr Ditch* proceedings. In pending water adjudications involving Indian interests, the affected tribe typically intervenes in its own name, or participates actively in the formulation of the government's case on its behalf, so that the situation presented by this case cannot be expected to recur.

For these reasons, the court's resolution of the res judicata issue in the unique circumstances presented here does not warrant further review, especially in the current interlocutory posture of the case.

1. Review of the narrow res judicata issue presented plainly would be premature at this time. As noted above, the case is in an interlocutory posture, with all substantive issues relating to the existence and extent of a reserved water right to maintain the Pyramid Lake fishery still to be resolved on remand. The court of appeals' partial reversal of the district court's dismissal of the fishery claim on res judicata grounds therefore leaves TCID in precisely the position in which it would have been if the district court itself had rejected TCID's res judicata defense, thereby requiring a trial on the merits of the claim. If the courts below reject that claim on the merits, the matter of the correctness of the court of appeals' res judicata ruling will be rendered moot. If the courts below sustain the fishery claim, review may be sought of the res judicata issue after appeal from a final judgment. Nothing in the facts of this case suggests that the Court should depart from its usual practice and grant review at this stage. Instead, the circumstances weigh decidedly against doing so.

a. First, the practical impact of the court of appeals' ruling is uncertain even if it is assumed that the district court ultimately will conclude on remand that a water right to maintain the Pyramid Lake fishery was reserved when the Reservation was established. The amount of any such right still must be quantified, which alone ren-

ders speculative the extent to which water users on the Newlands Project would be affected. But beyond this, a decision in other pending cases concerning the use of water in the Truckee and Carson Rivers or other measures to conserve water may result in the freeing up of substantial amounts of additional water to flow into Pyramid Lake. This water would be available to satisfy much, perhaps all, of whatever reserved water right might be found for fishery purposes on remand in the instant case, thereby preventing impairment of the derivative rights of Newlands Project water users to receive a portion of the water appropriated by the United States for the Project and decreed to it in *Orr Ditch* for that purpose.

For example, the final decree of the district court in the general adjudication of rights to the waters of the Carson River[14] is now pending on appeal to the Ninth Circuit, where it was argued and submitted on May 14, 1982. *United States* v. *Alpine Land & Reservoir Co.*, *supra*. The magnitude of the annual water duty (*i.e.*, the total annual per-acre amount of water needed to grow crops) decreed by the district court in *Alpine* for delivery to irrigators on the Newlands Project was 3.5 acre-feet per acre for project bottom lands, and 4.5 acre-feet per acre for project bench lands. *United States* v. *Alpine Land & Reservoir Co.*, *supra*, 503 F. Supp. at 888. On appeal, the United States is claiming that at least 42,447 project acres are entitled to an annual water duty of only 3 acre-feet per acre, a substantial reduction. As to the applicable water duty for the approximately 32,400 Project acres remaining, the United States seeks a remand for precise findings on trial evidence and, if necessary, for reception of additional evidence. In addition, the United States and TCID both seek to set aside a minimum 30,000 acre-foot pool at Lahontan Reservoir that the district court decreed for recreational purposes.

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[14] *Orr Ditch*, of course, adjudicated rights only to waters of the Truckee River.

Thus, the outcome of the pending appeal from the Carson River decree could substantially expand the availability of Truckee River waters to flow into Pyramid Lake, since less water would have to be diverted from the Truckee into Lahonton Reservoir where, together with Carson River waters, it is distributed to water users on the Project.

Conservation of water in the area, with a resulting increase in the flow of water into Pyramid Lake, also may result from the resolution of the pending suit brought by petitioner TCID in the district court in Nevada challenging the Secretary's proposed termination of the contract under which TCID operates the Newlands Project works pursuant to rules and regulations issued by the Secretary. *TCID* v. *Secretary of the Interior*, *supra*, note 6. The Secretary's proposed cancellation of the contract was occasioned by TCID's resistance to new operating criteria for the Project designed to ensure an economical delivery and application of water. *Ibid.* Similarly, the United States District Court for the District of Columbia also retains jurisdiction to enforce what it found to be the Secretary's trust obligation to operate the Newlands Project in a way that maximizes the availability of water for Pyramid Lake. *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (1973); see notes 6 and 8, *supra*. Yet another possible source for partial satisfaction of any reserved right that may be recognized for the Pyramid Lake fishery is from releases at the Stampede Dam and Reservoir, a part of the Washoe Project on the upper Truckee. This, too, is the subject of pending litigation in the district court below. *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982); see note 8, *supra*.

In addition to these other pending cases, but perhaps spurred by them, proposals have been advanced for the improvement of irrigation works on the Newlands Project, one of the oldest reclamation projects undertaken pursuant to the 1902 *Reclamation* Act, to prevent the unnecessary

loss of water in distribution. See, *e.g.*, 128 Cong. Rec. S4826 (daily ed. May 11, 1982). There have been suggestions that this refurbishing could be accomplished as part of a comprehensive resolution of the overall controversy concerning the use and allocation of waters of the Truckee and Carson Rivers in a way that would furnish additional water for the Pyramid Lake fishery while ensuring adequate supplies for the Newlands Project and other demands. *Ibid.* With the outcome of these related lawsuits and proposals still unclear, review at the present time is unwarranted.

b. Second, and as a necessary corollary to the foregoing discussion, a grant of certiorari by the Court at this time would not serve to conclude the broader controversy reflected in these other lawsuits and disputes. If the Court affirmed the Ninth Circuit's holding that assertion of a reserved water right for fishery purposes against the Project rights decreed to the United States in *Orr Ditch* is not barred by res judicata, then all that would be accomplished would be delay of the ultimate determination of whether a water right was in fact reserved for fishery purposes. And even if the Court were to reverse the Ninth Circuit's holding, the other pending cases discussed above, which might likewise reduce the availability of water to the Newlands Project or other users, would remain to be decided. In these uncertain circumstances, review by this Court of but one aspect of the broader problem is unwarranted.

2. a. In any event, the court of appeals correctly concluded that, in the unique circumstances of this case, the doctrine of res judicata did not wholly bar the assertion of a claim to a reserved water right for the Pyramid Lake fishery. Contrary to petitioners' contention, the court of appeals did not carve out a broad exception to the doctrine of res judicata, either in civil cases generally or in water adjudications in particular. The court of appeals in fact invoked that doctrine to bar the litigation of the fishery claim against *all* of the defendants sued by

the United States in *Orr Ditch* and their successors in interest and all persons who appropriated Truckee River water after the final decree was entered in *Orr Ditch* in 1944 in reasonable reliance upon that decree (Pet. App. 238a-240a).[15]

The court of appeals held only that the decree in *Orr Ditch* adjudicating water rights in the Truckee River as between the United States and the defendants in that case did not prevent adjustment, as between the respective uses for the Pyramid Lake Reservation and the Newlands Project, of the rights to water that were decreed to the United States alone in *Orr Ditch*. Thus, the court stressed that if the district court should conclude on remand that a water right was reserved to maintain the Pyramid Lake fishery when the Reservation was established, "any additional rights due the Tribe must come from water rights decreed to the government in *Orr Ditch*. Neither the Tribe nor the government may expand its water rights beyond the limits of government rights decreed in the original proceeding" (Pet. App. 248a-249a).

The basis of the court's ruling permitting consideration of the fishery claim to this extent was the established

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[15] Petitioner TCID also repeatedly refers to the related doctrine of collateral estoppel in arguing that assertion of the fishery claim is barred by the *Orr Ditch* decree. However, as the passage it quotes (81-2276 Pet. 9) from this Court's decision in *Montana* v. *United States*, 440 U.S. 147, 153 (1979), makes clear, the doctrine of collateral estoppel applies only to an issue that was "actually and necessarily determined" in the prior litigation. See also *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982), slip op. 5 n.6. In this case, the district court found no evidence that a reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings (Pet. App. 189a), and it accordingly rejected the collateral estoppel defense (*id.* at 192a). The court of appeals sustained the district court's finding that the existence of a water right for fishery purposes was not litigated in *Orr Ditch* (*id.* at 245a), and there has been no showing by petitioners to the contrary. Accordingly, TCID's collateral estoppel argument must fail. Further review of the collateral estoppel issue therefore is unnecessary.

rule that res judicata bars subsequent litigation as between co-parties only if they were formally adversaries under the pleadings in the original proceeding, by cross-claim or otherwise (Pet. App. 240a-241a). See *Restatement (Second) of the Law of Judgments* § 37 comment a, at 376 (1982);[16] 1B *Moore's Federal Practice* ¶ 0.411[2] (1982). In *Orr Ditch*, the United States advanced distinct claims to water for the Pyramid Lake Reservation and the Newlands Project. Moreover, these claims were advanced not for the federal government's own use, as in the case of a military reservation, national park, or national forest, but on behalf of and for the ultimate benefit of the Tribe and the water users on the Newlands Project, respectively.

These distinct interests asserted by the United States as plaintiff in *Orr Ditch* were aligned against claims by all other users of Truckee River water who were named as defendants; but the interests advanced on behalf of the Tribe and the Newlands Project water users in *Orr Ditch* were not represented as being adverse to one another. In this sense, the Reservation interests and Newlands Project interests were effectively co-plaintiffs in *Orr Ditch*, albeit formally represented by the United States. Accordingly, under res judicata principles applicable to co-parties who were not formally adversaries under the pleadings, the final decree in *Orr Ditch* recognizing rights in the United States for these two interests as against the named defendants asserting a right to the use of Truckee River water does not bar a subsequent adjudication as between the Reservation and Newlands Project interests advanced by the United States as plaintiff in *Orr Ditch*.

There is, of course, an exception to the principle regarding adversaries under the pleadings: as the court

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[16] The comment to Section 37 of *Restatement (Second) of the Law of Judgments, supra,* observes, for example, that in the absence of cross-claims or other similar pleadings between co-parties, "the possibility of merger and bar [*i.e.*, res judicata] by definition does not arise."

of appeals recognized (Pet. App. 241a), even where co-parties are not formally adverse to one another, they will ordinarily be bound as to matters actually litigated. *Restatement (Second) of the Law of Judgments* § 37 (1982); 1B *Moore's Federal Practice* ¶ 0.411[2] (1982). But as the courts below held, the issue of the existence of a reserved water right for fishery purposes was not litigated in *Orr Ditch* and therefore is not foreclosed here.

b. The court of appeals stressed that its holding on the res judicata issue was narrow. Thus, the court indicated that although res judicata ordinarily applies only as between parties who were formally adversaries under the pleadings in the first proceeding, it might be persuaded to relax that requirement as between the parties in water adjudications, in view of the special nature of such proceedings (Pet. App. 240a-241a).[17] The result of this relaxation would be that all parties to the water adjudication would be bound even if each party did not formally file separate cross-claims against every other party in the lawsuit. Accordingly, petitioners are simply wrong in contending (81-2245 Pet. 11-12; 81-2276 Pet. 12-13, 22-24) that the court of appeals has engrafted onto water adjudications an outdated or unsuited rule of adversity of parties on the pleadings as a condition of giving res judicata effect to the decree in such adjudications. The court did not finally decide that issue, but to the extent it intimated a view on the matter, it in fact *agreed* with petitioners that such a requirement should not be imposed in water adjudications.

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[17] The court explained (Pet. App. 241a; citations omitted):

> A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties' water rights are interdependent. Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose. Were we concerned only with parties or co-parties, we might be persuaded to relax the adversity requirement.

The court adhered to the established adverseness requirement in this case only in recognition of the fact that the Tribe and TCID (representing Newlands Project water users), whose interests are at stake here, were not co-parties in *Orr Ditch*, but "non-parties who were represented simultaneously by the same government attorneys" (Pet. App. 242a). To attach res judicata effect to the decree as between the Tribe and TCID in these circumstances would, the court reasoned, assume that the United States "not only represented dual interests on the same side of a dispute, but that the government simultaneouly, with the same lawyers, represented those dual interests in a dispute between themselves" (*ibid.*). But, the court continued, "[t]his posture is completely alien to our adversary system and will not be inferred from ambiguous facts. Before we conclude that government officials have undertaken such representation in litigation, we must be faced with a pleading in which this posture is clearly assumed" (*id.* at 242a-243a). Such was not the case here.

As the court of appeals explained, in *Orr Ditch*, "[n]either the court nor the government nor the Tribe or TCID was ever put on notice that a binding judgment was intended between TCID and the Tribe. Such notice might have suggested to the Tribe that it must seek to intervene, and to the court that intervention might be proper" (Pet. App. 259a, citing *State of New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977)). The result reached below also is consistent with the view that where, as here, efforts are made to bind non-parties to the former judgment, the courts will examine the actual configuration of interests of the non-parties to those of the former litigants, and, additionally, examine how much effective control the non-parties had over that litigant. See *Restatement (Second) of the Law of Judgments* § 37, and comments a, e and f (1982); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 592 & n.30, 593-

594 (1974); see generally *Gerrard* v. *Larsen*, 517 F.2d 1127, 1133-1135 (8th Cir. 1975).[18]

c. The result reached by the court of appeals in this case does not establish broad precedent for water adjudications generally. It does not disturb the res judicata effect of decrees in such suits as between the parties. Thus, as Judge Schroeder observed in dissent (Pet. App. 252a), the holding below would not control where the project water users *were* named parties in the water adjudication, as in the *Kent* decree (*Hurley* v. *Abbott*, No. 4564 Decree (3d Jud. Dist. Maricopa Co., Ariz. 1910) (see Pet. App. 252a n.1)), or the *Alpine* case, involving the adjudication of rights on the Truckee River. In the instant case, moreover, the fishery claim being advanced is for a use to which river water and the Reservation had been put from time immemorial and to which it was being put at the time of the decree in *Orr Ditch*. No effort is made to reopen a decree to devote water to new uses, or to seek additional water for a purpose—Indian irrigation—for which rights were specifically decreed in *Orr Ditch*. It should be clear that the res judicata ruling below will have virtually no preceden-

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[18] The circumstances of this case also fully distinguish the cases upon which TCID relies in contending (81-2276 Pet. 13-17) that the decision below conflicts with decisions of other circuits. In three of these cases—*National Bondholders Corp.* v. *Seaboard Citizens National Bank*, 110 F.2d 138 (4th Cir. 1940); *Livesay Industries, Inc.* v. *Livesay Window Co.*, 202 F.2d 378 (5th Cir. 1953), cert. denied, 346 U.S. 855 (1953); and *Scooper Dooper, Inc.* v. *Krafteo Corp.*, 494 F.2d 840 (3d Cir. 1974)—the co-interests in the prior proceeding appeared openly as separate co-parties, and the claim that was later barred was openly litigated and determined as a necessary element of the first suit. Such is not the case here. In the fourth case cited by TCID, *Diamond Shamrock Corp.* v. *Lumbermens Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969), no prior proceeding had been completed. The issue therefore was not the res judicata effect of a prior judgment, but the joinder as co-plaintiffs of an insured and its fire insurer against the insured's boiler and machinery insurer to ascertain under whose policy the loss was covered. The Seventh Circuit held that the co-plaintiffs were properly joined and would be mutually bound by any judgment regarding insurance coverage.

tial impact for an additional reason as well: in no other case to our knowledge has the United States acted with regard to Indians as it did in the *Orr Ditch* proceedings, thereby occasioning a subsequent reexamination by the Executive and the courts of the trust obligation of the United States with respect to the rights asserted. Moreover, in current water adjudications involving Indian interests, unlike that in *Orr Ditch*, the affected tribe itself typically intervenes in the case as a party or plays an active role, through its attorneys, in developing the government's case. Thus, the problems presented by the instant case cannot be expected to arise in the future so as to render the interlocutory decision below one of broad importance warranting review.[19]

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[19] Relying on the Ninth Circuit's own previous decisions in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), and 330 F.2d 897 (9th Cir. 1964), cert. denied, 381 U.S. 924 (1965), petitioner TCID argues (81-2276 Pet. 24-29) that the fishery claim was in any event extinguished by the Truckee River Agreement entered into by the Secretary in 1936, even if assertion of that claim is not barred by res judicata. This fact-bound issue does not warrant review. The agreement does not on it face mention a fishery water right, and there has been no interpretation of the agreement by the courts below that it was in fact intended to extinguish a fishing right. Moreover, the court of appeals read this Court's decision in *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 63 (1962), to have overruled its previous *Ahtanum* decisions concerning the Secretary's authority under 25 U.S.C. 2 and 9 to enter into such an agreement. But even if the court of appeals erred regarding the continuing validity of its own prior precedents, an intra-circuit conflict does not warrant review, especially in the interlocutory posture of this case. This argument, like the res judicata argument, will be available to petitioners on review of a final judgment if the courts below ultimately determine that there is a reserved right for fishery purposes and quantify that right in a way that substantially affects petitioners' interests. Review of this question therefore is inappropriate at this time.

## CONCLUSION

The petitions for a writ of certiorari should be denied.[20]

Respectfully submitted.

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[20] We do not separately address the contentions in the Tribe's conditional cross-petition for a writ of certiorari, No. 82-38, for if, as we urge, the Court denies the instant petitions it follows that the Tribe's conditional cross-petition should be denied as well.

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